(4)

Supreme Court, U. S.
FILED
OCT 13 1924
WM. R. STANSBURY
Clerk

No. 95

In the Supreme Court of the United States

OCTOBER TERM, 1924

ROBERT E. TOD, COMMISSIONER OF IMMIGRATION,
PETITIONER,

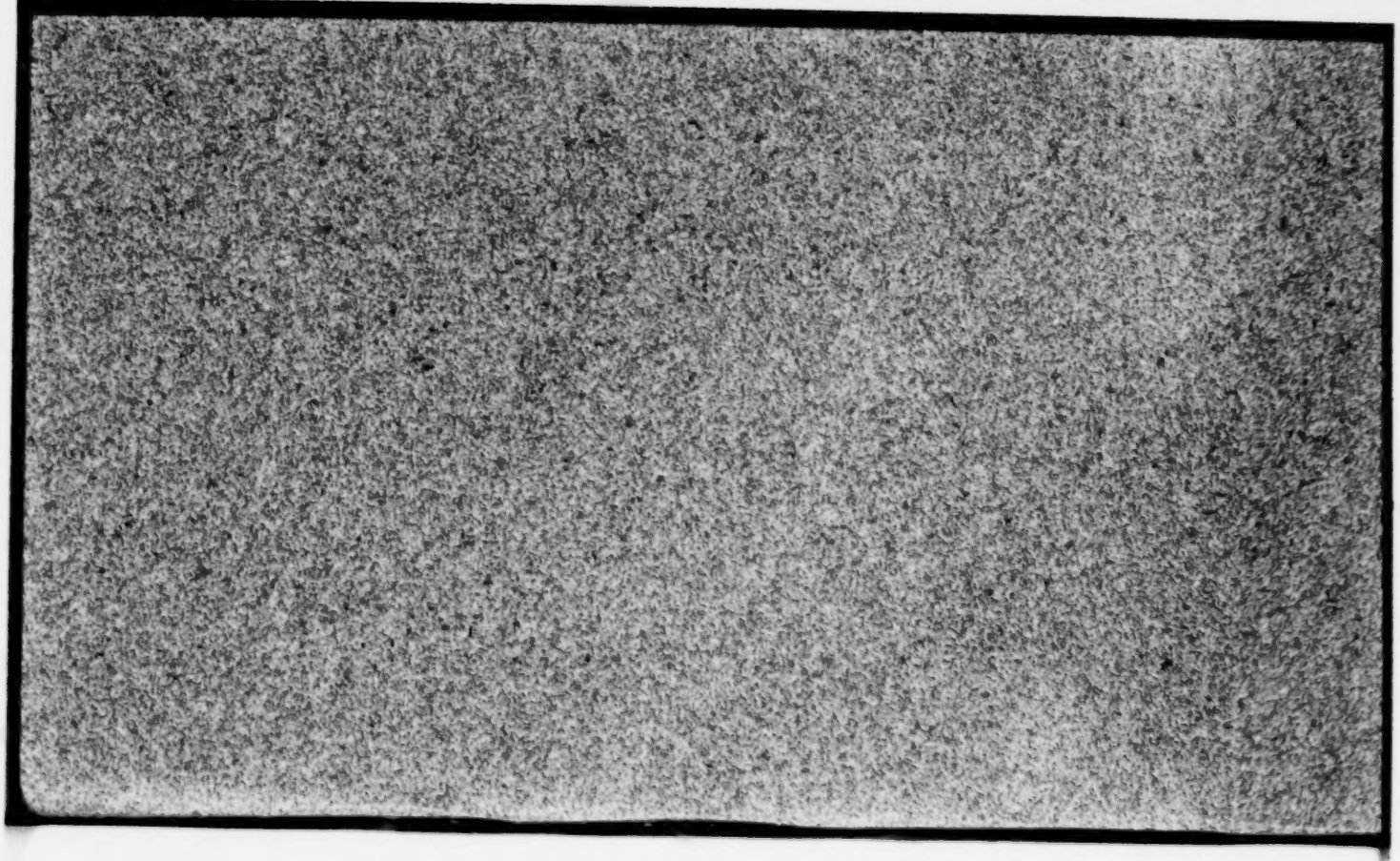
v.

SZEJWA WALDMAN ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONER

WASHINGTON: GOVERNMENT PRINTING OFFICE, 1924



In the Supreme Court of the United States

OCTOBER TERM, 1924

ROBERT E. TOD, COMMISSIONER OF IMMIGRATION, petitioner
v.
SZEJWA WALDMAN ET AL. | No. 95.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF PETITIONER

STATEMENT

This case is before the court on a writ of certiorari granted at the last term. Respondent and her three minor children, all aliens, were accorded a hearing by the immigration officers upon their application to enter the United States. As the result of the hearing all of the aliens were excluded, one upon the ground she was unable to read; another because afflicted with a physical defect affecting her ability to earn a living, and the remaining two as aliens likely to become public charges. (R. p. 11.) A rehearing was ordered by the Department of Labor, but said rehearing failed to work any change in the order of exclusion. (R. p. 12.) The aliens thereupon sued out a writ

of habeas corpus, alleging various grounds of unfair hearing, which are of no importance here, because not now in issue. After a hearing the writ was dismissed. (R. pp. 12 and 13.) On appeal the Circuit Court of Appeals reached the conclusion that the aliens had not been accorded a fair hearing, principally because they were not given an opportunity to appeal to the Secretary. The order of the trial court was therefore reversed with directions to sustain the writ and discharge the aliens. (R. pp. 21 and 22.) A rehearing was applied for in the Circuit Court of Appeals upon the ground that its order of reversal should have directed the trial court to proceed to determine the case on the merits, that is to say, to determine whether the aliens were entitled under the immigration laws to enter the United States. (R. p. 23.) Petition for rehearing was denied, however, in an opinion which declares, in substance, that a judicial hearing on the merits can only be had where the alien claims admission to the country on the ground of citizenship. (R. p. 25.)

QUESTION INVOLVED

Concisely stated, the sole question here presented is whether a trial court, upon satisfying itself in habeas corpus proceedings that an alien has been accorded an unfair hearing by the immigration officials, should merely order the discharge of the aliens or proceed to determine the right of the aliens to enter the United States under the immigration laws.

ARGUMENT

The dominant error of the Circuit Court of Appeals in the case at bar lies in its apparent misinterpretation of the decisions of this court declaring the practice which should be followed by the trial courts in disposing of alien cases on habeas corpus. The proper practice finds its genesis in *Chin Yow* v. *United States*, 208 U. S. 8, 13, which, it is true, involved the application of a Chinese person to enter the United States on the ground of citizenship. A careful analysis of the opinion in that case, however, will quickly disclose that it was not the fact of claimed citizenship which caused this court to direct a trial of the merits, but the fact that here was a person applying to enter the United States who had not yet established that right. The following excerpt from this court's opinion in that case confirms this view (p. 13):

> The petitioner then is imprisoned for deportation without the process of law to which he is given a right. *Habeas corpus* is the usual remedy for unlawful imprisonment. But on the other hand as yet the petitioner has not established his right to enter the country. He is imprisoned only to prevent his entry and an unconditional release would make the entry complete without the requisite proof. The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship a longer restraint would be illegal. If he fails the order of deportation would remain in force.

Observe also the following injunction of this court in that case (p. 11):

> Of course if the writ is granted the first issue to be tried is the truth of the allegations last mentioned. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther.

And again at page 13:

> But unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong.

In other words if the trial court should find in the above case that the hearing had been fair, it must treat as final and not open to judicial review the claim of citizenship.

The practice there outlined has been approved by this court in the subsequent cases of *Kwock Jan Fat* v. *White*, 253 U. S. 454, 465, and *Ng Fung Ho* v. *White*, 259 U. S. 276, 285. To the same effect are *Hoey Lum Qung* v. *Johnson*, 299 Fed. 246, 247, 248, and *Wong Wing Sing* v. *Nagle*, 299 Fed. 601.

It inevitably follows from the foregoing decisions that, where the trial court on habeas corpus finds the alien has not been accorded a fair hearing, it is its duty to determine the right of the alien to enter the United States, and this duty exists not only where the right of entry is based upon claimed

citizenship but equally where the right of entry is based upon the claim, as here, that the alien is able to meet the literacy or other requirements of the immigration laws.

It is respectfully submitted that the judgment below should be reversed and the cause remanded to the District Court for trial of the merits. *Kwock Jan Fat* v. *White*, 253 U. S. 454, 465.

JAMES M. BECK,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

OCTOBER, 1924.

○